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NO.

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FILED

IN THE SUPREME COURT

OF THE
NOV 14 1983

UNITED STATES

ALEXANDER L. STEVAS.

CLERK

OCTOBER TERM, 1983

DEL-AWARE UNLIMITED, INC., et al,
Petitioners,

v.

ROGER M. BALDWIN, District Engineer,
United States Corps of Engineers, et al.
Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Dated: October 31, 1983

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1010

DEL-AWARE UNLIMITED, INC. et al.

Appellants

v.

ROGER M. BALDWIN, et al.

Appeal from the
United States District Court
for the
Eastern District of Pennsylvania
(D.C. Civil Action No. 82-5115)
District Judge: Honorable James Giles

Argued June 13, 1983

Before HUNTER, HIGGINBOTHAM,
Circuit Judges, and
ZIEGLER, District Judge

*Honorable Donald E. Ziegler, United
States District Judge for the Western
District of Pennsylvania, sitting by
Designation

JUDGMENT ORDER

Appellants appeal from an interlocutory order of the district court denying appellants' motion for preliminary injunction. After consideration of all contentions raised by appellants, to wit, that the court erred:

1) as a matter of law by excluding from evidence virtually all of appellants' proffered testimony and documentation which was not included in the Corps' administrative record;

2) in holding that section 110(f) of the National Historic Preservation Act did not require the Corps to implement measures and consider alternatives which would minimize harm to the Pennsylvania Canal;

3) in finding that the Corps had given "great weight" to the views of the state and federal fisheries agencies, as required by its statute and regulations;

4) in finding insufficient likelihood of success on the merits of the NEPA claims to require injunctive relief,

It is ADJUDGED AND ORDERED that
the judgment of the district court be and
is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/S/ James Hunter, III
JAMES HUNTER, III,
Circuit Judge

Attest:

/S/
Chief Deputy Clerk

Dated: July 5, 1983

Certified as a true copy and issued
in lieu of a federal mandate on
August 10, 1983

Test:

Clerk, United States Court of Appeals
for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1010

DEL-AWARE UNLIMITED INC., et al.

Appellants

v.

ROGER M. BALDWIN, et al.

SUR PETITION FOR REHEARING

Present SEITZ, Chief Judge, ALDISERT,
ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM, BECKER,
Circuit Judges

The petition for rehearing filed by

APPELLANTS

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ JAMES HUNTER
Judge

Dated August 2, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., : CIVIL ACTION
et al. :

v. :

ROGER M. BALDWIN, et al. : No. 82-5115

ORDER

AND NOW, this 7th day of
December, 1982, in accordance with the
bench opinion rendered December 15, 1982,
it is hereby ORDERED that:

1. The claims asserted by plain-
tiffs under the Rivers and Harbors Act,
33 U.S.C. § 401, et seq., the Clean Water
Act, 33 U.S.C. § 1365, et seq., the
Endangered Species Act, 16 U.S.C. § 1540,
et seq., and the National Historic
Preservation Act, 16 U.S.C. § 470, et
seq., are DISMISSED for lack of jurisdic-
tion.

Entered: 12-20-83

CLERK OF COURT

2. Plaintiffs' claims against the Nuclear Regulatory Commission, and Harold Denton in his individual and official capacity are DISMISSED for lack of jurisdiction.

3. Plaintiffs' claims against the Department of Environmental Resources of the Commonwealth of Pennsylvania (PDER), and Peter Duncan in his official capacity as Secretary of PDER, are DISMISSED for lack of jurisdiction. In the alternative, these claims are DISMISSED on the basis of comity and this court's determination not to exercise pendent jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

4. Plaintiffs' claims against Roger Baldwin, District Engineer, U.S. Army Corps of Engineers, Alexander Aldrich, Chairman of the Advisory Council on Historic Preservation, William Gordon, Assistant Secretary, U.S. Department of

Commerce, and Gerald Hansler, Executive Director of the Delaware River Basin Commission (DRBC), in their individual capacities, are DISMISSED.

5. Plaintiffs' motion for preliminary injunction as to the remaining defendants asserted under the National Environmental Policy Act (NEPA), 16 U.S.C. § 150, et seq., the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq., and under common law with respect to the DRBC, is DENIED. Whether singly or cumulatively, the issues raised by plaintiffs are insufficient on the record evidence to show that defendants acted unreasonably, arbitrarily or capriciously in determining that an Environmental Impact Statement was not required and in rendering a negative declaration as to the planned construction of the Point Pleasant Water Diversion Project.

BY THE COURT:

/s/ JAMES T. GILES

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., : CIVIL ACTION
et al. :

Plaintiffs : No. 82-5115

v. :

ROGER M. BALDWIN, et al. :

Defendants :

- - -

December 15, 1982

BEFORE: HONORABLE JAMES T. GILES, J.

Reported by:

Sidney Rothschild OFFICIAL COURT
REPORTERS

Room 2722
U.S. Courthouse
Philadelphia, Pa 19106

Walnut 5-9480

THE COURT: Good afternoon.

First of all, the record will be completed by the following: By letter of submission of December 8, 1983, DRBC sent in a copy of its Exhibit Number 15. That will be admitted.

By letter of submission of December 13, the plaintiffs submitted a copy of P58, which is a memorandum dated May 28, 1981, Archaeologist, Office of Cultural Programs, NERO, HRS to Assistant Regional Director, Office of Cultural Program NERO, HRS Subject: Trip Report, Point Pleasant Water Diversion Project, Point Pleasant, Pennsylvania.

This document will be admitted.

Philadelphia Electric Company was given leave to file certain documents pertaining to proceedings before the NRC, in response to plaintiffs' submissions pertaining to NRC matters. Those submission will be admitted as PECO exhi-

bits, whatever the next PECO number is, according to the record.

MR. CHANIN: If Your Honor please, that is Exhibit 4.

THE COURT: That will be admitted along with the certificate of service form which is attached thereto.

The hearing in this matter concluded Friday evening, the Court has reviewed the entire administrative record, all the exhibits introduced in this proceeding, the various memoranda, responses, attachments thereto, legal authorities cited, including statutes, regulations and legislative history.

Counsel are to be commended for doing a fine job in pulling together, in a short time, during and after the conclusion of the proceeding, the evidence in the case and focusing it in a manner helpful to the Court.

I have agreed to give a bench opinion because both parties have asserted that by today, by virtue of the actions proposed of the NWRA to commence construction, it would suffer or begin to suffer irreparable harm. I devoted my time to this point in reviewing the record and making my decision and this opinion will constitute the opinion of the Court with respect to the plaintiffs' motion for preliminary injunction. The Court reserves the right to supplement, amend or edit the same.

This action was commenced by plaintiffs substantially as citizens action against various federal agencies, the Pennsylvania Environment Resources Department, DER, PECO, Philadelphia Electric Company, and NWRA, which is the Neshaminy Water Resources Authority.

Individuals have also been named as defendants in their individual

and official capacities, where they are the executive directors of the various defendant agencies.

This action is commenced against all defendants, it appears under the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, the Delaware River Basin Compact, the Fish and Wildlife Coordination Act, the substantive provisions of Section 110 of the River and Harbors Act of 1899 and Section 404 of the Water Pollution Control and Federal Water Pollution Control Act requirements for permits under Section 402 and for best available technology under Section 316(b) and the Atomic Safety and Licensing Act and regulations thereunder, referring to page 2 of the complaint.

The plaintiff either orally or in the final briefs in this matter has

asserted that it intended to file a claim under the Administrative Procedure Act, the plaintiff does not assert a claim under the Administrative Procedure Act. For purposes of this bench opinion, I shall assume that the plaintiff has standing to assert and therefore is entitled to amend the complaint to assert claim under the Administrative Procedure Act against the appropriate agency defendants.

The complaint, while it names the Delaware River Basin Commission as a defendant and its executive director, in the caption fails to state a cause of action in its body against the Delaware River Basin Commission.

The plaintiff was understood by the Court to amend orally the complaint at the time of the hearing to assert a claim against the DRBC, that its denial of the Delaware petition for reconsidera-

tion was arbitrary and capricious and therefore reviewable in this Court.

Various defendants have filed motions to dismiss, either on jurisdictional grounds with respect to certain allegations or with respect to failure to state a claim upon which refusal can be granted.

With respect to the claims of the plaintiffs asserted under the National Historic Preservation Act, the Endangered Species Act, the Clean Water Act and the River and Harbors Act, I find that this court has no jurisdiction. Those acts of Congress have specific provisions which limit the right of citizens to bring suits in this Court. There are notice and provisions which are mandatory. There is no implied cause of action under the River and Harbors Act, in accordance with the decision of the

United States Supreme Court and using the same rationale, there is no implied cause of action under either of the National and Historic Preservation Act and Endangered Species Act or Clean Water Act.

Congress has acted in these areas to circumscribe the availability of the federal court to plaintiffs unless and until certain statutory requirements are met. Plaintiffs appear to concede as much in that they argue in their beliefs that they would still have a right of action under the Administrative Procedures Act, because either there is final agency action or that there is action by the agency which is so threatening of immediate and irreparable harm that resort to the Court is necessary to enjoin agency action.

With respect to plaintiffs' claims against the NRC and Harold Denton in his individual and official capaci-

ties, I find that this court is without jurisdiction in the context of this complaint, even assuming that the Susquehanna case is still good law in this circuit. First, there is an ongoing administrative review of the PECOLimerick application within the domain of the Nuclear Regulatory Commission. Plaintiffs, through Delaware are participating in that administrative proceeding, which is not complete. When completed, the plaintiffs, if agreed, will have a right of appeal to the Third Circuit by statute.

Number two, the construction activity which is the subject of this injunction action names NWRA as the builder and constructor of the water system. NRC has no jurisdiction to enjoin NWRA's construction. NRC will determine when, if at all, the PECO water

diversion to Limerick I or II will be operational. That is not before this Court.

Furthermore, the NRC has not refused to prepare an environmental impact study. This situation is easily distinguishable from the Susquehanna case cited by the plaintiffs for the reasons just enumerated.

So, the claims asserted under the Atomic Safety and Licensing Act, are hereby dismissed.

With respect to the claims against Roger Baldwin, as an individual; Alexander Aldrich, as an individual; William Gordon, as an individual and Gerald Hansler, as an individual; I find that the plaintiffs' complaint fails to state a cause of action and those actions will be dismissed with prejudice for the following reasons. Although the plaintiffs assert that Baldwin, Aldrich, Gor-

don and Hansler are being sued in their individual capacities, a review of the complaint discloses no action by those individuals which amounts to individual actions, as opposed to action in their official capacities.

Moreover, the relief sought by the plaintiffs is against the agency. If plaintiffs are asserting a claim under the Administrative Procedures Act, for example, the proper claim is against the agency, not the individual.

Moreover, I would find from a review of the record and the complaint, that each of the individuals is entitled to qualified immunity. I might say, as well, that the proceeding is not really as on motion to dismiss. It's after hearing.

With respect to the Pennsylvania Department of Environmental Resources

and Peter Duncan, I find that this Court has no jurisdiction. The claims there asserted are under the Clean Water Act. Again, there is a jurisdictional requirement of notice.

Moreover, I doubt that this Court would have jurisdiction in an APA claim against federal agencies, over state agencies, with respect to their administrative agency compliance. Further, the plaintiffs are pursuing in the state administrative channels, challenges to the Pennsylvania DER Acts with respect to various certificates or decisions not to require permits of various kinds.

As a matter of comity, plaintiffs would be required in this Court's estimation, to exhaust administrative remedies in the state procedure and seek whatever relief is appropriate there.

So, even assuming that this Court has jurisdiction with respect to

the Pennsylvania DER defendants, it would not exercise that jurisdiction.

For those reasons, the complaint with respect to Peter Duncan as secretary of the DER is dismissed. As a footnote, I observe that there is no emergency situation arising from the claimed inaction of the state official in this instance. It is conceded that the Delaware River Water will not in any way lower the standards of the water in the Perkiomen Creek and that the best available technology is being used for the intake at Point Pleasant.

Remaining, I find are claims asserted under the National Environmental Policy Act and the Administrative Procedure Act. Having studied all of the relevant material, as well as that which might be irrelevant, but admitted and reviewable, I have concluded that the

plaintiffs' motion for preliminary injunction will be denied under both the NEPA and the APA against each of the remaining defendants.

First, with respect to the NEPA and the Corps of Engineers. Plaintiffs complain that the Corps of Engineers in rendering its environmental assessment and negative declaration with respect to the Point Pleasant intake and water diversion system, either acted unreasonably or arbitrary and capriciously in failing to require or failing to conduct an environmental impact study or statement.

The standard of reasonableness is a higher standard of review than arbitrary and capricious, but I find under either standard, the plaintiffs at this juncture on this record have not shown under the standard applicable to considering requests for preliminary in-

junction have entitlement to that extraordinary relief. This Court is limited under the reasonableness standard to a review of the actions of the defendant agencies and cannot engage in its own personal evaluation of the mental processes of the agency administrators.

So, it's not a matter of record of what this Court would do if it were in the agency's position; it is what the record shows reasonably was considered, taking not only the findings but the administrative record as a whole and considering the administrative record as a whole, I find that with respect to a significant number of plaintiffs' claims, they are collaterally estopped because of the Hansler decision.

The plaintiffs have made out a prima facie case with respect to identifying certain changes since the Hansler

decision, which would be of significant impact, if the plaintiffs' allegations were taken as true, but considering the defendant agency's evidence as this Court must at this stage, I find that the plaintiff has not shown by a preponderance of the evidence that there was either an abuse of discretion or a failure to give a hard look at, seriously consider, or give great weight to other agency opinion.

The plaintiffs here are collaterally estopped by the Hansler decision to the extent that the Hansler decision considered or was asked to consider and decided matters which are raised in this complaint. A study of the complaint in the Hansler case demonstrates that it was wide ranging and touched upon almost all the issues which are raised here as if they were new.

The plaintiffs are bound be-

cause they are in privity with those plaintiffs who initiated the action before Judge VanArtsdalen in this respect: That the plaintiffs there, as the plaintiffs here represented the public interest and their interests and injuries now rise no higher and are no less than those asserted by the plaintiffs in Hansler for the public interest.

Judge VanArtsdalen considered not the name of the plaintiff but rather the issue, that is whether or not certain actions or environmental effects were significant or substantial so as to require of the DRBC the preparation of an environmental impact statement as opposed to a final environmental assessment. This Court incorporates all that was decided and considered and therefore precluded here by Judge VanArtsdalen in the Hansler case and as affirmed by the

Third Circuit.

What then is new?

1. Designation of the Army Corps of Engineers as the lead agency in determining those matters, environmentally, which were within its specific expertise: navigation, construction in the river, and matters relating to the construction as it would affect navigable waters.

2. A movement of the intake system away from the shore bank and into the channel of the Delaware River.

3. A formal determination by the Advisory Council on Historic Preservation that the village of Point Pleasant was eligible for and was then placed on the historic register.

4. An assertion that Shortnosed Sturgeon had been seen in the area of Point Pleasant intake although the report was unconfirmed.

A decision by the Corps of Engineers to segment its consideration of the NWRA permits between Point Pleasant and the Pine Run rechannelization.

A salinity study performed by the DRBC, a ground water study done for and by the DRBC.

Next, the most current good faith negotiations between those states who are parties to the DRBC.

Next, a statutory provision change, 110(f), I believe, which the plaintiffs assert required the Corps to take all possible steps to maximize non-impact on national landmarks or historical sites. In the latter category, assert that the authority had the obligation independently to consider other intake sites than Point Pleasant, so as to avoid the historical and archaeological sites altogether.

This Court is called upon, therefore, to interpret that provision. In the findings of facts or the statement of findings, the Corps made specific findings that it had considered alternative routes around Point Pleasant but those were unreasonable for the reasons stated therein. Moreover, in accordance with 33 CFR 800, a memorandum of agreement was entered into between the Corps, the Advisory Council and the State Historical Preservation officer, with respect to procedures to minimize the impact of the historic district, the channel, and all other areas disrupted by the construction. The undertaking in the memorandum agreement is to have continued monitoring by the Advisory Council, state office, the states, Historical Preservation officer and the Corps to insure that all possible steps are taken to minimize the impact to the historical district

canal. Indeed, as I read this agreement, no irreversible action can be taken out and a determination that the action is an action which meets their requirements of 33 CFR 800. The plaintiffs argue that Section 110(f) required the Corps to look for other intake sites along the Pennsylvania canal, other than Point Pleasant, once the historic district has been certified.

The Corps took the position in its findings, that it was bound in terms of its consideration of what was possible by the determination of the DRBC as to the appropriate point for water to be taken from the Delaware River.

In other words, it deferred to the DRBC with respect to that judgement as to whether or not that point of intake was most appropriate, given its other determinations of river resources, basin

resources and the needs for water in Bucks and Montgomery Counties, as well as for PECO at Limerick.

I do not find that that deference was unreasonable or arbitrary and capricious. There is a question as to whether or not Section 110(f) applied to other than federal or federally assisted projects. Assuming that it does, it is not to be given the same scope of agency determination requirement as was given and required by statute in the Overton Park case. In that case, the statute required that the agency make a determination that there was no feasible or practical route for highway, other than through a park and only after such determination was made, could be administrator go on to determine what steps should be taken to minimize the impact on the park area.

Here, the Congress decided to

delete the requirement for determination by the agency administrator as to feasible or practical alternatives, leaving only that section which required the administrator to determine what steps would maximize or diminish the impact on the historic district.

Considering the legislative history, I do not find that there was a requirement on the Corps to make a determination independently that there was some other place than Point Pleasant for the intake, assuming 110(f) applied. I find that the Corps did consider and gave great weight to the determination by DRBC, that Point Pleasant was the proper site for the intake to accomplish the water supply permits which it had issued, pursuant to the entire history of the Point Pleasant project, including those matters which were before Judge

VanArtsdalen.

To the extent that the Corps referenced and included all of the proceedings by reference that had gone before, I find on this record, that the Corps did consider that history in determining the appropriateness to defer to the DRBC decision to Point Pleasant as the intake location and there is evidence in the record that the Corps did review and consider all of the documentation pertaining to the Point Pleasant project as considered by the DRBC and the AEC and the NWRA. So, I do not find it reasonable to construe 110(f) as requiring an administrator to do other than take all possible steps open and available to it at that time to minimize the impact on the historic district or canal. The Corps considered all of the options open to it and on this record, acted reasonably in arriving at a

memorandum of agreement.

Under the applicable regulations, there's a presumption that the memorandum agreement satisfies the obligation of the Advisory Council to advise. I believe the language of the regulation is that the entering into a memorandum of agreement satisfies the obligations of the Advisory Council.

For that reason, I would find that as to the Advisory Council, that injunctive action is not appropriate under the Administrative Procedure Act. The Advisory Council has satisfied the requirements of the regulations. It has not undertaken any final action with respect to any irreversibly damaging action, with respect to the canal or the historic district as certified.

I find that the record is sufficient for this stage of the proceedings

to satisfy me that the Corps studied and considered the effect of moving the intake 245 feet into the Delaware River as it effects or is considered in conjunction with the black eddy, salinity, the effect on the oyster industry and fisheries, dissolved oxygen, shad, Shortnosed Sturgeon, blasting effects, dredging, effects on fish other than shad and Shortnosed Sturgeon, flow velocity at the intake, the effects of impingement and entrainment of fish at the intake, the level of the top of the intake in the river below the surface of the river at various flows, the effect on navigation, recreation and safety to those persons using the river at that point for fishing or other forms of river recreation.

With respect to the salinity, I find that the diversion of water could be said to have been reasonably found by the

Corps not to have any significant environmental impact. Only 8 CFS of the diversion can be said to be subject to consumption. As to that amount, there is no dispute that that is not measureable by existing gages. Critically important, it appears from the record, that to the determination of the DRBC and the Corps, that the Point Pleasant project would not have any adverse effect on the salinity level being placed at Point Pleasant, is that with the water returns, 50 percent of the water will be returned to the Delaware River above or at the Schuylkill River mouth.

The Schuylkill River mouth is stated in the literature in the record to be important as a stream flow to the curtailment of the salinity level.

So, all the water taken out will be put back in, at least that which

is measureable. So, to the extent the plaintiffs argue that the diversions will adversely affect salinity, I find that that is not borne out by the record. Moreover, it was considered and discussed by Judge VanArtsdalen.

With respect to dissolved oxygen, I find from this record, that there are studies available to the Corps which were available to the Corps which showed that these diversions or this diversion at Point Pleasant would have no significant environmental impact.

Flows less than that which would be caused by the diversions even at maximum diversion would not significantly change the dissolved oxygen level at any point along the river.

With respect to the flow velocity at the intake level, I find that the evidence is, in this record, satisfies the reasonableness and the arbitrary and

capricious test in that there were studies to show that given the placement of the intake, the kind of intake, the placement of the intake tubes close to one another and so forth, that there would be no significant impact on fish.

The studies made were put on a worse case basis, assuming that there was a spawning ground and the Point Pleasant eddy, that shad would be there as well as Shortnosed Sturgeon either spawning or moving past that point.

The size of the intake screens are two millimeters, that size was considered in relationship to the larva of shad and sturgeon and other fish, although no tests were made on shad per se, there were tests made on fish eggs smaller in size than shad eggs, leading reasonably to the conclusion that shad eggs would not be impinged.

Moreover, the swimming ability of shad was considered. The flow velocity is calculated to be two to one at the intake but the intake structure as presently designed, in cooperation with the Pennsylvania Fish Commission and the United States Fish and Wildlife Service is a state of the art intake, which has very little impact upon early stages of fish, even assuming less than 2-to-1 velocity flow at intake. The intake velocity diminishes dramatically as one moves one foot from the intake.

There was a netting operation in the vicinity of the intake for Shortnosed Sturgeon, which in 1981 disclosed no sturgeon. No sturgeon had been caught in the immediate vicinity of the intake.

The Shortnosed Sturgeon is an endangered species, there was a determination by the U.S. Department of Commerce

that the Point Pleasant water diversion project would not endanger species in the river; further made determinations that the proposed operations would not constitute significant environmental impact with respect to that endangered species. It made a determination that its biological opinion was not related to river flow, rather to what was known about the Shortnosed Sturgeon and that is, that its eggs fall to the river bottom, attach to rocks, or fall or find their way under rocks, and hence, are not subject to intake velocity considerations.

Moreover, there was a determination made but there would be ongoing studies by the applicant, so that monitoring would be made to insure that the project in no way endangered Shortnosed Sturgeon.

As I said before, the intake is designed anticipating the presence of Shortnosed Sturgeon, though there is no evidence of Shortnosed Sturgeon in the area.

On the basis of this record, I find there is no basis for injunctive action with respect to the Department of Commerce either under NEPA, under the APA.

Plaintiffs really have not offered anything to refute the biological opinion rendered.

MR. LERNER: Excuse me, Your Honor, can we take a brief recess?

THE COURT: You may.

With respect to esthetics, which would include the height of any buildings, the noise of any transformers, the replanting of any areas affected by the construction, including the bluff, the evidence shows that there is a memo-

randum of agreement to blend the underground piping and buildings in the environment.

Apparently, plaintiffs complain that the bluff outside of the certified historic district is not being considered. However, I understand from this record that the pipeline as to the bluff will be underground and covered.

There was the consideration of the archaeology in the area. There is no evidence at that time that there is any archaeology or aboriginal site in the direct line of the water transmission lines. There is an archaeologist, who as a condition of the permit is present at the site, supervising both operations in or about the canal as well as those pertaining to the esthetics. And, the Pennsylvania Historical Preservation officer is there to approve any and all

action.

Plaintiff claims the Corps acted arbitrarily and capriciously or unreasonably in failing to consult or to consult in good faith with the Fish and Wildlife Service which opposed the Point Pleasant diversion. I find that Corps did consult and did consider all of the positions advanced by the Fish and Wildlife Service as well as the Pennsylvania Fish Commission. Simply because the Fish and Wildlife Service had a reluctance to agree with the Corps, that the permit issue, it was the Corps' decision and not Fish and Wildlife's, with respect to permit issuance. The Fish and Wildlife Service did not elevate the matter as it had a right to do and its failure to do so is evidence that it did not on appeal see any significant environment impact.

Nothing new was raised by the

Fish and Wildlife Service that had not been considered by the Corps.

Plaintiffs argue that the Corps erred in not considering that with respect to the permit application the Pennsylvania Utility Commission had rejected PECO's application there for a license to commence operation of Limerick II. The record shows that reasonable it would have been engineering-wise unsound to treat the application and permit or construction as involving only water for Limerick II. Limerick I had been authorized and encouraged by the PUC. Moreover, NWRA, and independent water requirement and PECO's possible withdrawal with respect to Limerick II, would not have greatly enlarged the project of NWRA.

Plaintiffs argue that the Corps erred in issuing its permit while NRC or

other local state agencies had not acted with respect to their permits which might be required. I believe counsel conceded during the hearing, that there is no statutory or regulatory requirement in that regard.

Plaintiff's main argument is that the Corps erred in segmenting the Point Pleasant project from the Pine Run rechannelization.

There is a regulation which requires applicants to submit applications for an entire project as opposed to piecemeal submission, that regulation came into effect in 1982, two years after the applications had been filed by NWRA; that regulation does not take away the discretion of the Corps to determine that objectively there should be division of the project and here there is evidence that the rechannelization though beneficial too, is not essential to the opera-

tion of the water diversion system project. Therefore, even if there is some environmental effects relative to the rechannelization, it is not essential to the operation of the system. With respect to the canal, itself, Pennsylvania authorities have review the proposed construction and have determined that the proposed construction under the canal will benefit the canal. The Commonwealth of Pennsylvania owns the canal. The kind of intrusions into the canal or under the canal, are not uncommon along its route.

Now, with respect to the plaintiffs' claim that the Corps did not consider a final level B study or a ground water study done for the DRBC in making its determinations, I find that again, it was reasonable for the Corps to defer to the DRBC and this is consistent with the determination by Judge VanArtsdalen in

the Hansler case. The level B study is not inconsistent with the management powers of the DRBC to limit the withdrawals for PECO, if river flow is below 3000 CFS and to manage the withdrawal of the potable water by NWRA in times of drought, nor is it inconsistent with the declared management objectives of the DRBC at Montgomery-Bucks County or other areas having ground water, develop a better system for utilization of ground water in conjunction with surface water.

With respect to the ground water study completed in September of 1982, it does appear from the report that the rechargeable rate for wells in the kind of rock which is prevalent in these counties is very slow and unpredictable.

With respect to plaintiffs' contentions that PECO or NWRA could get their water from Philadelphia or other

places, including ground water wells, I find that the plaintiffs' claim of arbitrary and unreasonable would fail based on the Pennsylvania DER Assessments and studies rejecting that possibility as being unworkable, both water-wise and in terms of its hope for industry or population growth patterns to diminish the effect on consumption of water. Plaintiffs argue, as well, that the Corps or DRBC did not consider the Schuylkill River or upstream Schuylkill River storage as an alternative to taking out of the Delaware River. Again, the record shows that there was consideration by DRBC and Pennsylvania DER of upstream storage possibilities, along with PECO, as well as the availability of water at times required by the Limerick operation from the Schuylkill and those alternatives were rejected.

With respect to the Schuylkill in terms of temperature of the water or low flows or adverse environmental conditions which would arise from a diversion, now, I do not find as a matter of law that the Corps was obligated to do an independent study of every matter that might have been raised by the plaintiffs. The Corps was entitled to review, to consider the source of the liability, the measurements and its own experience in evaluating information developed by others, whether it was the NWRA or the DRBC or PECO. A review of the administrative record shows that information from these various sources was in the file available to the Corps and encompassed in its findings. Perhaps not in detail, but sufficiently so, as to persuade this Court that it would be erroneous to conclude that the Corps acted unreasonably or arbitrary and

capriciously.

With respect to the DRBC, the plaintiffs' claims against the Corps overlap, but to the extent that they do, any discussion with respect to the DRBC will be equally applicable to the Corps. With respect to the Corps, I find that it's actions on the state of this record satisfy the reasonableness test. Because the DRBC entertained and specifically treated the plaintiffs' petition for reconsideration one could analogize that to affording the plaintiffs a hearing.

Therefore, the standard of review in that instance would appear to be the arbitrary and capricious standard as opposed to the reasonableness standard. The arbitrary and capricious standard is usually accorded to a reviewing agency in decisions where there has been an administrative hearing. The reasonable-

ness standard may be more appropriate in reviewing agency action that was taken not pursuant to a hearing or after a hearing or for promulgation of a regulation. In reviewing the assumed claim against the DRBC, I must assume that the claim is being asserted under the Administrative Procedure Act or under - you tell me, Mr. Sugarman. Under what statute or regulation are you proceeding as to the DRBC?

MR. SUGARMAN: It's under common law, Your Honor.

MR. GOLDBERG: Your Honor, if I may, the U.S. Administrative Procedure Act specifically of the DRBC's compact is not applicable to it and that fact is so noted in Judge VanArtsdalen's opinion. So, we are not governed by that procedure specifically.

THE COURT: All right. I will look at the claim against the DRBC in

terms of whether or not the DRBC acted reasonably or arbitrarily and capriciously, because I am satisfied that under those tests, no matter how the plaintiffs might be proceeding, injunctive relief is not appropriate. Judge VanArtsdalen found, and I agree, that the DRBC has particular expertise to which the Corps could defer to the DRBC as lead agency to determine all locations of water, the need for water and the management of the river. The Delaware River is a managed flow river. All agree. The DRBC has the exclusive responsibility for the management of this river and water in the basin. The thrust of plaintiffs' charges as to DRBC, is that given its analysis of river flows, that the 3000 CFS objective at Trenton is unreasonable and known to be a mirage by the DRBC for purposes of the Point Pleasant project.

In short, plaintiffs argue that DRBC acknowledges that there's not enough water in the river and that any diversions without augmented flows from dams or reservoirs to be constructed in the future, will be detrimental to marine life, to the fishing industry and all of the objectives with respect to salinity control, dissolved oxygen and the like.

The plaintiffs' arguments on this record overlook several important factors with respect to the level B studies, the salinity studies and the good faith negotiations. First, the level B study, that's not taking into consideration in its analysis that there would be no controls by PECO if the flows are below 3000 CFS in terms of future projections, nor the management ability of DRBC with respect to the withdrawal by NWRA in times of low flow, nor is there plaintiffs' evidence or argument which

considered the fact that the level B report states, I believe, that given existing storage capacities, there is still 110 CFS available for allocation, nor does the plaintiffs' argument take into consideration that the diversion at Point Pleasant would result in consumptive loss of only 8 CFS. To equate the effects of withdrawal of 95 MGD with a consumptive loss of 95 MGD, is misleading.

DRBC has the responsibility to administer the river flows to meet the permanent application requirements and restrictions as well as one of the public needs served by the river.

Mr. McCoy's presentation basically was a challenge to DRBC or an attempted challenge to DRBC to fulfill its commitments; that is through good faith. This Court is not in a position from this record to place suspicion on

the ability of DRBC to manage the river nor would it be appropriate for this Court to in effect attempt to manage the river for the DRBC. Its management abilities with respect to PECO and NWRA would reasonably appear to give it the manageability to control the withdrawal of those applicants in accordance with the good faith negotiations results, whatever they may be, which as I understand it from the material reviewed will be to look at the drought of the '60's as the drought of record as a plateau, the record suggests that the drought of the '60's is recurrent on 100 to 300 years as opposed to the drought of the '30's, that occurs maybe once every ten years.

Plaintiffs allege, among other things, that the DRBC has already put into effect the recommendations from the good faith on negotiations with respect

to the draw down of water from New York storage unit and hence, argues the plaintiffs their must be a bad faith attempt undertaking to ramrod into effect all the other recommendations, including a relaxation of the salinity objectives.

The record shows, however, that the good faith negotiation recommendations are subject to public hearing and comment and that is an ongoing process, and hence, there is no room for this Court to find, on this record, that there has been a relaxation in fact of the salinity objective.

This Court is not the proper forum for an attack on the proposed salinity level, if there is any change, that should be done through the proper administrative procedures available to plaintiffs or others through the DRBC.

I have reviewed that the plaintiffs' objections raised to the DRBC and

the responses to each. In light of the record before the DRBC or that as considered by the DRBC through its own contractors or supplied through studies contracted for through the NWRA. I do not find any reason to conclude that in denying the plaintiffs' petition for reconsideration, the DRBC acted arbitrarily, capriciously or unreasonably.

I could go through each of these in terms of the objections and the responses on this record but I will not.

I have studied the objections and I have studied the responses and found in the record support for the responses.

Based upon independent findings and discussions here, the Court adopts and incorporates in this bench opinion the following proposed findings of facts as prepared by NWRA, because they are

consistent with the Court's foregoing findings.

The Court adopts 1 through 25; 27 through 40, those are background historical as to which there should be no objection.

41 through 65. 66 through 76. 77 through 82. 83 through 116. 117 through 134. 135 through 147. 148 through 150.

I find that those findings of facts are supported by the record evidence available to the Corps and the DRBC.

Plaintiffs final argument with respect to all of the agency defendants and NWRA and PECO is that there was a commitment to the Point Pleasant location such that the Corps merely rubber stamped the desire of the NWRA and PECO to use the Point Pleasant site because it was titled to NWRA and that thereafter all of

the efforts of the Corps amounted to no more than going through the motions and was not a good faith environmental assessment.

The plaintiffs suggest that the hiring or the contracting of Miss Mintz was designed to result in a historical district whose boundaries would not include the bluff or the esthetic charm of the village as opposed to selecting the Bucks County Conservancy as advisor on the historic certification because or whereas the later had a broader sense of the boundaries of the historic district.

I find that the record shows that the Bucks County Conservancy took the position that it was unavailable as a contractor to complete the project within 30 days, Miss Mintz was.

The plaintiffs argue that Miss Mintz did not consult with the Bucks

County Conservancy.

It is apparent from the record that the Bucks County Conservancy did review and critique Mintz' report evaluation. The Court submitted to the Advisory Council both the Mintz report as well as the Bucks County Conservancy's critique comments of the Advisory Council had both Mintz' report and the Bucks County Conservancy's views as well as the views of the State Historical Preservation officer in determining the extent of the boundary of the historic district.

Plaintiffs argue that Colonel Baldwin refused to meet with representatives of Delaware on site. The record does not support the view of Colonel Baldwin as one who took the tact of avoiding contact with the public or with the plaintiffs; the record does show meetings with counsel of Delaware and Colonel Baldwin and Colonel Baldwin

acting as a moderator on a public hearing of the project.

I do not regard, based upon what I reviewed in the record, the Corps' correspondence with the Fish and Wildlife Service as being arbitrary and capricious.

The Wildlife Service did not specify the bases of its objections to the project with any backup data. It's speculative positions did not raise any concerns not already addressed by the Corps.

Its request for information are puzzling, inasmuch as it had as much access to the DRBC information as did the Corps with respect to impact on biotics. Likewise, it had access to the NWRA material. It did not conduct any independent studies. The oxygen demand and segmentation appears to have been a

factor considered by the DRBC and the NWRA in the dissolved oxygen studies in respect to the flows in the river. I do not observe that the Fish and Wildlife Service took the position in the case before Judge VanArtsdalen that the project was bad, but did not raise any issue then which was not considered and studied to Judge VanArtsdalen's satisfaction by the Corps.

As Judge VanArtsdalen found there, just because one agency has a difference of mind with the permitting agency, is not a basis for saying that an environmental impact statement is required. In considering whether or not the plaintiffs have borne their burden of proving entitlement to injunctive relief, the Court must consider whether or not the plaintiffs will suffer irreparable harm if relief is not granted, or whether the defendants will be harmed if relief

is granted, whether the public, generally, will be harmed if relief is granted and whether the plaintiffs are likely to prevail on the merits of the claim.

I have found that considering the evidence before me, that the plaintiffs have not shown that they are likely to prevail on the merits of the claim. I have considered whether or not the construction in the Delaware River or environs should be enjoined until such time as the NRC acts or the Corps acts upon the rechannelization project in terms of permitting or not. The PUC has determined Limerick I's construction is in the best interest of the public and it has directed that PECO complete that construction at the earliest possible time consistent with public safety. The requirements placed upon the applicant

NWRA by the Pennsylvania DER is to complete all construction by the end of 1984. The work in the river has to take place within a specified time during any winter, reducing the period of time that can be devoted to construction and with construction with deliberateness, with a view towards public safety and compliance with the minimization of loss of water in transport. The DRBC has determined a need for water in Bucks and Montgomery Counties, based upon the experience in 1980 and 1981 of water problems in those areas with wells running dry.

Balancing the harm that would occur to the public if the project is not available mechanically for the supply of water to Delaware and Montgomery Counties through NWRA to supplement the well water and considering the harm to the public if the Limerick I is not available for operation on time because of the lack of

completion of the mechanical project, versus the harm to the river, to the canal, to the environs, including the bluff, I find that on balance, the public would suffer more harm if the project presently is enjoined than if it continues. One, there is no harm to the river presently if there is construction. Two, the work under the canal will benefit the canal in terms of its ultimate strength, according to the Pennsylvania Authorities. Three, there is an architect available there and there are procedures outlined for the photographing and replacement of each aspect of the canal dirt or stones removed. The piping is intended to be underground. The effect on the wetlands will be minimal and of no significant impact and that really has not been pressed as an issue here and the harm to the bluff with blasting will be

subject to the same conditions as blasting in the district. The pipes will be underground and covered. I agree with plaintiffs that if they have shown that there was a significant environmental impact that has been swept under the rug, then, that would be sufficient to show irreparable harm.

Here, it is not enough to say, well, the NRC has not acted and Limerick might not operate. There is an independent applicant, NWRA, whose needs have independent justification through DRBC.

Are there any points any counsel believe now the Court failed to consider in its opinion?

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED,	:	CIVIL ACTION
INC., et al.	:	
	:	
V.	:	
	:	
ROGER M. BALDWIN,	:	
et al.	:	NO. 82-5115

BENCH OPINION CORRECTION SHEET

AND NOW, this 23rd day of
December, 1983, it is hereby ORDERED that
the following correction sheet shall be
incorporated into the court's bench
opinion rendered in this matter on Decem-
ber 15, 1982.

1. P. 1438, line 4 - change
"Section 110" to "Section 10".

2. P. 1439 line 7 - change
"refusal" to relief".

3. P. 1439, lines 9-11 -
delete "the National Historic Preserva-
tion Act," and "and the River and Harbors

Act,". Insert "and" after "Act" on line 10.

4. P. 1439, line 15 - after "Harbors Act," add "see California v. Sierra Club, 451 U.S. 287 (1981), and,".

5. P. 1439, line 17 - after "Court" add "in Middlesex City Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1. (1981),".

6. P. 1439, line 24 - change "beliefs" to "briefs".

7. P. 1440, line 10 - after "case" add "619 F.2d 231 (3d Cir. 1980, cert. denied, 449 U.S. 1096 (1981),".

8. P. 1440, line 15 - change "agreed" to "aggrieved."

9. P. 1440, line 25 - change "study." to "statement."

10. P. 1443, line 20 - delete "have".

11. P. 1443, line 22 - change "the reasonableness" to "either".

12. P. 1444, line 1 - delete
"a matter of record of".

13. P. 1444, line 8 - after
"decision," add, 536 F. Supp. 26 (E.D.
Pa. 1981), aff'd, 681 F.2d 805 (3d Cir.
1982)."

14. P. 1445, line 24-25 -
change "Advisory Council on Historic
Preservation" to "keeper of the National
Registry".

15. P. 1446, line 1 - add
after "was", "determined to be."

16. P. 1446, line 9 - substi-
tute "Corps," for "DRBC,".

17. P. 1446, line 13 - after
"110(f)," add "of the National Historic
Preservation Act,".

18. P. 1446, delete lines 15-
16 - add "undertake to the maximum extent
possible, such planning and actions as
may be necessary to minimize the harm to

national landmarks."

19. P. 1446, line 17 - delete
"assert".

20. P. 1447, line 4 - change
"channel," to "canal,".

21. P. 1447, line 11 change
"out" to "without".

22. P. 1447, line 24 - add
"water" before "for".

23. P. 1448, line 7 - after
"case," add "401 U.S. 402 (1971)."

24. P. 1448, delete line 11 -
change "be" to "the".

25. P. 1448, delete line 17-18
and substitute "steps would minimize the
harm to the historic landmark."

26. P. 1449, line 7 - change
"appropriatness" to "appropriateness".

27. P. 1450, line 25 - add
after "consumption," "assuming that the
River flow is less than 3000 cfs."

28. P. 1451, line 1 - change

"gages." to "guages."

29. P. 1451, line 2 - delete
"that".

30. P. 1451, line 7 - delete
"or at" and "mouth". Add after "above",
"Philadelphia and 50 percent through".

31. P. 1451, line 18 - delete
"available to the Corps."

32. P. 1452, line 2 - delete
"is"; line 13, substitute "is" for "are".

33. P. 1452, lines 14 and 15 -
end sentences with "millimeters." and
"fish."

34. P. 1453, line 8 - end
sentence with "species."

35. P. 1453, line 9 - after
"Commerce" add "(National Marine Fisheries Service)".

36. P. 1453, line 10 - substitute
line 10 with "not endanger the species in the river. Further, it made a

determination".

37. P. 1453, line 11 - add "a"
after "constitute".

38. P. 1453, line 14 - end
sentence with "flow." Substitute "to
what" with "it was based on what".

39. P. 1455, line 21 - change
"reasonable" to "reasonably".

41. P. 1455, line 22 -
reverse order of words "engineering-wise"
and "unsound".

42. P. 1455, line 25 - after
"NWRA" substitute "has an" for "and".

43. P. 1456, line 14 - end
sentence with "submission".

44. P. 1456, line 19 - delete
"too".

45. P. 1456, line 24 - change
"review" to "reviewed".

46. P. 1457, line 14 - change
"at" to "that".

47. P. 1458, line 8 - add

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"water" after "taking".

48. P. 1458, line 12 - delete
"and"; place period after "Schuykill";
line 13 - start next sentence "Those . .
." and connect with sentence in line
14, stopping at "diversion" on line 16;
start next sentence "Now," line 16; p.
1458, line 20 - substitute "and the
reliability of" for "of the liability,".

49. P. 1461, line 8 - end
sentence after "study" and substitute
"that's not taking" with "They do not
take".

50. P. 1461, line 9 - substi-
tute "in its" with "DRBC's".

51. P. 1461, line 10 - change
"controls" to "withdrawals".

52. P. 1461, line 12 and 16 -
end sentences with "flow." and "alloca-
tion." respectively.

53. P. 1461, line 18 - add
after "CPS," "assuming that the River

flow is less than 3000 cfs."

54. P. 1462, line 12 - end
sentence with "plateau."

55. P. 1462, line 18 - delete
"on".

56. P. 1462, line 20 - change
"their" to "there" and add "or" after
"attempt".

57. P. 1464, line 23 - change
"later" to "latter."

58. P. 1466, line 11 - delete
"do not".

59. P. 1466, line 22 - change
"suffere" to "suffer".

60. P. 1472, line 11 - delete
"not been" and substitute "to be".

61. P. 1477, line 14 - delete
"from" and substitute "if". Line 17,
change "Section 111(f)" to "Section
110(f)"

62. P. 1479, line 21 - add
"stated" after "specifically".

63. P. 1481, line 20 - change
"scaring" to "scarring".

64. P. 1482, line 22 - change
"log," to "long,".

65. P. 1487, line 7 - change
"That's" to "That".

66. P. 1487, line 15 - change
"filed" to "final".

67. P. 1488, line 7 - change
"fine," to "find,".

68. P. 1490, line 13 - change
"my" to "by".

The standard of review, scope of hearing and evidentiary rulings made during the course of the preliminary hearing, are incorporated herein by reference. The administrative record of the Corps, all of which was reviewed, is hereby marked and made "Court Exhibit 1."

BY THE COURT:

/S/ James J. Giles
J.

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IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

DEL-AWARE UNLIMITED, INC., :
et al., :
Plaintiffs : CIVIL ACTION
: No. 82-5115
v. :
: :
BALDWIN, et al., :
Defendants.: :

FINDINGS OF FACT
(Proposed By NWRA and Adopted
By The Court).

I. HISTORY OF PRIOR ACTIONS, ENVIRON-
MENTAL REVIEWS AND APPROVALS

1. A water study of the Neshaminy Creek Basin was undertaken under the co-sponsorship of the predecessor to Pennsylvania Department of Environmental Resources, the U.S. Soil Conservation Service, Bucks County and Montgomery County. As a result, the Neshaminy Creek resource plan was developed. This study included recommendations to construct, inter alia, a Point Pleasant Pumping Station, a taking point for water supply

purposes at Chalfont, and ten dam structures along the Neshaminy Creek, including the dam that had created Lake Galina. (NWRA Exhibits 13, p. 14).

2. On October 26, 1966, the Watershed Project for Neshaminy Creek was approved by the Delaware River Basin Commission and was added to the Delaware River Basin Comprehensive Plan. The decision was supplemented on January 25, 1967, by adding the entire multi-purpose project as described in the 1966 Water Resources Study to the DRBC Comprehensive Plan. (Neshaminy Creek Watershed Project, Bucks and Montgomery County, Pennsylvania, DRBC Docket No. D-65-76CP and Bucks and Montgomery County Commissioners, Neshaminy Creek Water Shed Project, Bucks and Montgomery Countys, Pennsylvania, DRBC Docket No. D-65-76CP(2), NWRA Exhibit 13, pp. 14-15).

3. On December 8, 1970, the Pennsylvania Water and Power Resources Board issued to Bucks County Water Allocation Permit No. WA-649 authorizing the withdrawal of Delaware River water for public water supply purposes. (NWRA Exhibit 13, p. 15).

4. On March 17, 1971, the DRBC amended its Comprehensive Plan to include an enlarged Point Pleasant Pumping Station to supply additional amounts of water for public water supply and, in addition, to provide water to PECO for Limerick. This amendment was a result of a feasibility study prepared in 1970 at the request of DRBC. (NWRA Exhibit 13, pp. 15-16).

5. In February, 1973, DRBC completed and submitted to the counsel on Environmental Quality the Environmental Impact Statement on the Point Pleasant Diversion Plan, a project which included

the withdrawal of up to 150 million gallons per day (mgd) of water from the Delaware River at Point Pleasant to be conveyed to the Chalfont Water Treatment Plant and to Limerick. (Final Environmental Impact Statement on the Point Pleasant Diversion Plan, Bucks and Montgomery Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

6. DRBC concluded in its Final Environmental Impact Statement that the proposed project would be beneficial to the Neshaminy and Perkiomen Watersheds and not detrimental to the Delaware River Basin. (NWRA Exhibit 13, p. 16).

7. In January, 1977, Bucks County completed a study of water supply needs of Central Bucks County and the alternatives for meeting those needs. The study concluded that the Neshaminy Water Supply System was the best over all. (Central

Bucks County Water Supply Study, NWRA Exhibit 13, p. 16).

8. In February, 1977, Montgomery County completed a study of the water supply needs in Central Montgomery County and the alternatives for meeting those needs. Said study concluded that the Neshaminy Water Supply System was the best overall. (Water Supply Study Montgomery County, NWRA Exhibit 13, p. 16).

9. In March, 1977, the Delaware Valley Regional Planning Commission completed its Interim Population Projection Report including, therein, projections for the population by the year 2000 in Central Bucks and Central Montgomery Countys. (Interim Projections Report for Bucks, Chester, Delaware, Montgomery, Philadelphia Countys, Pennsylvania, NWRA Exhibit 13, p. 16).

10. In conjunction with the results of the three last-referenced reports, NWRA initiated the preparation of its Environmental Report which included re-evaluation of the Neshaminy Water Supply Project as described in the DRBC Comprehensive Plan and an evaluation of the information contained in the DRBC Environmental Impact Statement on the Point Pleasant Diversion Plan. In conjunction with the preparation of this Report, NWRA drew on the expertise of aquatic biologists, environmental engineers, archeologists and other consultants. (NWRA Exhibit 13, p. 17).

11. On the basis of the above-referenced studies and reports, the designed capacity of the Treatment Plant at Chalfont was selected to remain at 20 mgd for the initial installation; however, the ultimate capacity of the Treatment Plant was reduced from 80 to 40

mgd to meet the supplemental water needs of the service area of Central Bucks and Montgomery Countys. (NWRA Exhibit 13, p. 16).

12. In September of 1978, NWRA submitted to the Department of Environmental Resources an application for a modification to the Water Allocation Permit along with an updated report. The report concluded that there is a need for less supplemental water supply than originally projected in 1970. (NWRA Exhibit 13, p. 17).

13. In November, 1978, the Department of Environmental Resources issued Water Allocation Permit No. 0978601 to NWRA, superseding the originally issued Water Allocation Permit. This Permit was issued together with an exhaustive report prepared by the Department of Environmental Resources supporting and justifying the issuance of the new permit. The

new permit granted NWRA, under certain conditions, the right to withdraw water from the Delaware River at Point Pleasant as well as from Pine Run and North Branch of Neshaminy Creek to provide up to 40 mgd of potable water to Central Bucks and Central Montgomery Countys. This potable water would supplement the existing limited groundwater supplies. (DER Water Allocation Report, November 1, 1978, NWRA Exhibit 13, p. 17).

14. Concurrent with all of the above-mentioned reviews of the basic Point Pleasant Project and Neshaminy Water Supply System, the Atomic Energy Commission completed the preparation of its Final Environmental Impact Statement on the Limerick Generating Station which incorporates, by reference, the Environmental Impact Statement prepared by the DRBC. (Final Environmental Impact Statement relating to the proposed

Limerick Generating Stations, Units I and II, Philadelphia Electric Company, NWRA Exhibit 13, pp. 17-81).

15. Based on the Final Environmental Impact Statement prepared by the Atomic Energy Commission, the previous Environmental Impact Statement prepared by the DRBC, and the records compiled at public hearings held before the Atomic Safety and Licensing Board and the Appeal Board of the Nuclear Regulatory Commission, the Nuclear Regulatory Commission issued to Philadelphia Electric Company construction permits for the Limerick Plant in March, 1975. (In the Matter of Philadelphia Electric Company (Limerick Generating Station, Units I and II), Docket Nos. 50-352 and 50-353 (March 19, 1975), NWRA Exhibit 13, p. 18).

16. An appeal was taken to the Third Circuit Court of Appeals and they decided, inter alia, that the

Environmental Impact Statement prepared by the Atomic Energy Commission and DRBC met the requirements of the National Environmental Policy Act. (Environmental Coalition of Nuclear Power, et al. v. NRC, Docket No. 75-1421 (November 12, 1975), NWRA Exhibit 13, pp. 18-19).

17. In February 1979, NWRA issued its draft Environmental Report. (NWRA Exhibit 14).

18. On May 30, 1979, NWRA held public hearings on its draft Environmental Report. (NWRA Exhibit 14).

19. On July 5, 1979, NWRA filed its application for Section 3.8 approval under the Delaware River Basin Interstate Compact with DRBC which was accompanied by its Environmental Report, the transcript of the Public Hearing of May 30, 1979, and a report prepared by NWRA responding to the comments received at

the May 30, 1979 Public Hearing. (NWRA Exhibit 13, p. 20).

20. When NWRA filed its application for Section 3.8 approval with DRBC, DRBC had available to it three Final Environmental Impact Statements, together with all the supporting data. They were: (1) "Point Pleasant Diversion Plan, Bucks and Montgomery Countys," prepared by DRBC in 1973; (2) "Limerick Generating Station, Units I and II," prepared by the Atomic Energy Commission in 1973; and (3) "Neshaminy Creek Water Shed," prepared by the U.S. Department of Agricultural, Soil Conservation Service in 1976. (NWRA Exhibit 13, p. 20).

21. In February, 1980, pursuant to the Rules of Practice and Procedure §2-4.3, DRBC issued its Environmental Assessment of the Neshaminy Water Supply System and related components and, at the same time, the Executive Director issued

a notice of his intent to issue a "Negative Declaration." DRBC invited public comment to these documents. Notice of the Executive Director's intent was forwarded to all relevant federal and state agencies; also notice of the Executive Director's action was given at the DRBC public meeting of March 10, 1980. (NWRA Exhibit 13, pp. 20-21).

22. In August, 1980, pursuant to DRBC's Rules of Practice and Procedure, §2-4.4, DRBC issued its Final Environmental Assessment for the Neshaminy Water Supply System including the issuance by the Executive Director of a "Negative Declaration." Public notice of his recommendation to issue a "Negative Declaration" was sent to all the relevant state and federal agencies; also, said action was announced at the DRBC public meeting of August 27, 1980. (NWRA Exhibit 13, pp. 20-21).

23. On November 18, 1980, pursuant to public notice and DRBC's Rules of Practice and Procedure, §2-1.5, a public hearing was held on DRBC's proposal to amend its Comprehensive Plan and to grant Section 3.8 approval under the Interstate Compact to NWRA and PECO to construct the components of the Neshaminy Water Supply System. (NWRA Exhibit 13, p.21).

24. On February 18, 1981, DRBC authorized an amendment to the Comprehensive Plan and granted the Section 3.8 applications of both PECO and NWRA, subject to certain expressed conditions and limitations. (NWRA Exhibits 2 and 3).

25. The actions taken by DRBC in February, 1981 were reviewed by the U.S. District Court, Eastern District of Pennsylvania, in the matter of Delaware Water Emergency Group, et al., v. Gerald M. Hansler, et al., 536 F.Supp. 26 (E.D.

Pa. 1981). The primary issue before the court was whether the DRBC had fully and fairly considered the environmental impact of the proposed project in conformity with the National Environmental Policy Act of 1969.

26. Not adopted by the Court.

27. On Appeal to the Third Circuit Court of Appeals, the Third Circuit affirmed, without opinion, Judge VanArtsdalen's decision. (Delaware Water Emergency Group, et al. v. Gerald M. Hansler, et al., 681 F.2d 805 (3d Cir. 1982)).

28. Following a preliminary meeting among PECO, NWRA and the U.S. Army Corps of Engineers Staff (Corps), by letter dated September 8, 1980, PECO and NWRA provided to the Corps a joint submission describing the Point Pleasant Pumping Facilities and Associated Systems. Said submission provided detailed information of all facilities including the treatment

plant and all transmission mains.
(Plaintiffs' Exhibit 15 and 60).

29. By letter dated October 28, 1980, after review of all material submitted by PECO and NWRA, the Corps advised PECO and NWRA that it had determined that two (2) permit applications were to be submitted; one (1) for the Pine Run rechannelization and one (1) for the Point Pleasant intake structure. All other facilities were covered by the "nationwide" permit program.

30. As a result of the Corps directive, in December, 1980, NWRA applied to the U.S. Army Corps of Engineers for a permit (Application No. NAPOP-F-800534-3) to construct a water intake structure in the Delaware River and under the Pennsylvania Canal at Point Pleasant and for a permit (Application No. NAPOP-R-80-813-3) to rechannel a portion of Pine Run adjacent to the site

for the water treatment plant. (Corps of Engineers, Exhibit 5).

31. On April 6, 1981, the Corps issued a public notice that NWRA had applied for the above-referenced permit. (Corps of Engineers Exhibit 3, p. 1).

32. On August 10, 1981, the Corps issued a notice of public hearing concerning NWRA's application for permits and scheduled said hearing for September 15, 1981. (Corps of Engineers Exhibit 2, p. 8).

33. On September 15, 1981, a public hearing was held on the NWRA applications at the Bucks County Community College, Newtown Township, Pennsylvania. The public hearing was attended by approximately 1000 concerned persons. (Corps of Engineers Exhibit 2, p. 8).

34. A record of the public hearing was prepared and notice of its

availability was published on January 11, 1982. (Corps of Engineers Exhibit 2, p. 8).

35. The Commonwealth of Pennsylvania, Department of Environmental Resources, in conjunction with its evaluation of NWRA applications for, inter alia, the water intake structure, prepared an "Environmental Assessment." (NWRA Exhibit 13).

36. Said Environmental Assessment was issued in August of 1982 contemporaneously with the issuance of permits to NWRA and PECO. (NWRA Exhibit 13).

37. Said Environmental Assessment was forwarded to the Corps and reviewed by the Corps. (Corps of Engineers Exhibit 2).

38. On October 14, 1982, the Corps of Engineers issued an Environmental Assessment in conformity with the National Environmental Policy Act of 1969.

(Neshaminy Water Resources Authority, Point Pleasant Diversion Project, Point Pleasant, Bucks County, Pennsylvania, Environmental Assessment, Corps of Engineers Exhibit 3).

39. The Environmental Assessment prepared by the Corps concluded, inter alia, that the issuance of a \$10/404 permit did not constitute "major federal action" and that the installation of the water intake, conduit and pumphouse will not "significantly effect the environment." (Corps of Engineers Exhibit 3, pp. 17-18.)

40. On October 25, 1982, the U.S. Corps of Engineers issued permit No. NAPOP-R-80-534-3 to NWRA permitting NWRA to construct a water intake structure in the Delaware River/Delaware Canal at Point Pleasant, Bucks County, Pennsylvania. (Corps of Engineers Exhibit 2).

II. THERE HAVE BEEN NO SIGNIFICANT CHANGES IN THE POINT PLEASANT PROJECT OR SURROUNDING ENVIRONMENTAL CIRCUMSTANCES SINCE JUDGE VANARTSDALEN'S DECISION IN DELAWARE I.

A. There will be No Adverse Impact on Fish and Aquatic Biota From The Change in the Location of the Intake Structure.

41. A 1978 Report prepared by RMC Corporation and the NWRA Environmental Report prepared in 1979 evaluated the effect that a shore line intake would have on the aquatic life in the Delaware River. (N.T. 206, NWRA Exhibit 14).

42. The Environmental Assessment prepared by DRBC in February of 1980 concluded that such a shoreline intake would not cause a significant impingement or entrainment of aquatic life and as a result there would be no significant adverse effects. (DRBC Exhibit 3, page 2-37, 2-38).

43. During the pendency of the DRBC evaluation of NWRA's pending 3.8

application, a report was submitted by NWRA to DRBC entitled "Biological Evaluation of the Proposed Water Intake in the Delaware River at Point Pleasant, Pennsylvania." Said report was prepared by P.L. Harmon of the Pottstown Ecological Laboratories. (Harmon, 1980 Report, NWRA Exhibit 35).

44. The Harmon 1980 Report evaluated the effects of a wedge-wire intake structure located 200 feet from the Pennsylvania shore on all forms and stages of aquatic life located in the area of Point Pleasant; the evaluation included an analysis of the impacts on all stages of American Shad, from the larvae stage up to adult. For purposes of his evaluation, he assumed it was a nursery and spawning area for shad. (NWRA Exhibit 35 pp 8-12).

45. The Harmon 1980 report concluded that the wedge-wire intake will

effect a marked reduction in potential entrainment and impingement losses of aquatic life when compared to a conventional travelling screen design (shore-line intake). The operation of the proposed intake will not result in biologically significant impacts of the resident or migratory fish populations (NWRA Exhibit 35 p. 1).

46. At the time of the approval of the Docket Decision D-65-76 CP (8) by DRBC in February 18, 1981, DRBC engineering division and environmental unit staff had already reviewed the intake design change. (NWRA Exhibit 34; NWRA Exhibit 3, p 8).

47. The only environmental impact not considered by DRBC of the intake structure on aquatic life was the effect said intake structure would have on shortnosed sturgeon. The existence of shortnosed sturgeon eight miles

downstream from Point Pleasant was not determined until after the completion of the DRBC Environmental Evaluation. (Delaware I p. 46).

48. Subsequent to the DRBC Environmental Evaluation, NWRA proposed to extend the intake structure further into the river where velocities are greater. It was proposed to extend the intake an additional 45 feet into the river. (NWRA Exhibit 5).

49. The flow velocities of the river 245 feet from shore are greater than those velocities 200 feet from shore (NWRA Exhibit 6; NWRA Exhibit 35 p. 15).

50. Based upon a review of velocity measurements and the river contours, the back eddy in the river extends out 150-160 feet from the west bank. (NWRA Exhibit 4, Exhibit 6 and Exhibit 35).

51. The Fish and Wildlife Service concluded, in a letter dated March 26,

1982, that the location of the intake 45 feet farther out into the Delaware River and use of Johnson wedge-wire screens with a maximum inflow velocity of .5 feet per second and 2mm spacing will reduce localized adverse affect on the fishery. If a flow greater than 2,000 cfs can be maintained in the river at Point Pleasant, Fish and Wildlife Service expects very little negative effect on flow patterns in the back eddy caused by the change in the location of the intake structure (NWRA Exhibit 4 and DRBC Exhibit 16).

52. Even under the worst possible case conditions, the effect on aquatic life of a maximum withdrawal of 95 mgd, at a river flow of 2,500 cfs, will be practically nil. (NWRA Exhibit 7).

53. The eddy area is located at least 62 feet shoreward of the intake

structure, at least 62 feet away from the intake location. (NWRA Exhibit 10).

54. Upon the completion of review by the Corps' Hydrology-Hydraulics Branch of materials submitted by Del-AWARE and by GKY and Associates, Inc., it concluded that the subject report does not provide any substantive or significant arguments for requiring additional investigation. Further, it was concluded that said reports tended to reveal a bias. (NWRA Exhibits 8, 9, and 10).

55. There is substantial and reasonable evidence in the record to support the Corp's conclusion that the proposed intake alignment intercepts the actual river channel and thus the main river at about a right angle and approximately 800 feet downstream of the mouth of the Tohickon Creek. (Corps of Engineers Exhibit 2 p. 20).

56. The maximum intake velocity of the intake structure will be .5 feet per second only when the maximum 95 mgd is being withdrawn. The average intake velocity, at that time, is .35 feet per second, and as the amount of water withdrawn reduces, the intake velocity reduces in a linear relationship. (NWRA Exhibit 7 and Plaintiff Exhibit 66).

57. The average flow velocity toward the screens, at 1 foot away from the the screens, at the maximum rate of withdrawal, will only be approximately .1 feet per second. (Plaintiffs' Exhibit 66 p. 3).

58. When DRBC is not able to achieve a flow at Trenton of 3,000 cfs through the management of water stored within the Basin complementing natural flows, only water for public water supply purposes will be able to be withdrawn at Point Pleasant until PECO is able to

provide its own storage facilities.

(DRBC Exhibit 1 and 9, NWRA Exhibits 1, 2, and 3).

59. When flows are below 3,000 cfs, it is highly unlikely that NWRA will be able to withdraw the maximum amount it is allowed to withdraw for public water supply, 49 mgd, due to numerous factors, including DRBC Regulations and Conditions included in Docket Decision No. D-65-76CP(8), (NWRA Exhibit 3, Condition Y and Z, NWRA Exhibit 7, DRBC Exhibit 9, DRBC Exhibit 1).

60. NWRA will not be able to withdraw the maximum amount for public water supply purposes unless such withdrawals are subsequently approved by DER through subsidiary water allocation permits (NWRA Exhibit 13, p. 65).

61. There was substantial evidence in the Corps record for it to conclude that the withdrawal of water as permitted

and regulated by the DRBC will have no significant adverse impact on the Delaware River System. Withdrawal of water, even during low flow conditions, will result in no significant adverse impact on aquatic organisms due to entrainment and impingement; such intake represents the "State of the Art" technology with respect to intake structure design. (Corps of Engineers Exhibit 2 p. 15).

62. If, under unforeseen circumstances, an adverse impact upon aquatic life is noted, both DRBC and DER will require such corrective action as appropriate to mitigate such impact. (NWRA Exhibit 13, p. 32, NWRA Exhibit 3, Condition M).

63. No significant dangers are anticipated as a result of the backwashing of the intake structure (NWRA Exhibit 11).

64. The minimum surface elevation at a flow of 3,000 cfs is in excess of 70 feet and thus there will be at least a minimum of 4 feet of water between the top of the intake and the surface of the river at 3,000 cfs (NWRA Exhibit 5, Plaintiffs' Exhibit 66).

65. There is substantial evidence in the record to support DRBC conclusion that the design changes in the intake structure should reduce the degree of adverse biological impact from that already approved as of February, 1981. (p. 11, Staff Response, DRBC Exhibit 1).

B. No Significant Impact Will Be Caused On The Dissolved Oxygen Levels Or On The Salinity Levels In The Delaware River As A Result Of The Withdrawals At Point Pleasant.

66. There have not been any substantial changes in circumstances from February 18, 1981, that would cause any difference in the impacts caused by the

withdrawals of water from Point Pleasant upon the dissolved oxygen and salinity levels in the Delaware River. (DRBC Exhibit 1: DRBC Resolution #82-22 and Staff Response to Petitioners' Factual Allegations of 9/24/82).

67. DRBC concluded in February, 1981, based upon its analysis of the affects of withdrawals, including materials contained in the Level B Study, that the effects of withdrawal at Point Pleasant when flows at Trenton are 3,000 cfs or lower, on salinity levels would be virtually immeasurable. (DRBC Exhibit 3, p. IV-16, DRBC Exhibit 1, p. 3 of Staff Response, NWRA Exhibit 13, p. 84).

68. Because there is no change in the rate of withdrawal projected by NWRA or the use of the water as projected by NWRA from that which was proposed in 1981 and, further, in light of the fact that there is no change in the circumstances

concerning the flow of Delaware River water, the impacts on salinity, as evaluated in 1981, are unchanged. (DRBC Exhibit 1).

70. The withdrawal of water at Point Pleasant will not affect the shad runs because the dissolved oxygen levels are substantially reduced at approximately river mile 93 based upon pollution discharges to the Delaware River which have a significant impact on the dissolved oxygen levels. (DRBC Exhibit 2).

71. The dissolved oxygen model used by DRBC did consider the effects of accumulated sediment deposits. (DRBC Exhibit 2, p. 26).

72. It is not possible to significantly ameliorate the impacts of pollution loads upon dissolved oxygen concentration throughout the estuary by releasing stored water, because of the vast

amounts required to have a significant impact. (DRBC Exhibit 2, p. 76).

73. Only 3% of the time, since 1971, has the flows in the Delaware River been below 3,000 cfs. (Staff Response, p. 3, DRBC Exhibit 1).

74. There has been no change in the amounts of water to be withdrawn at Point Pleasant, the use of the water to be withdrawn, or the flows in the Delaware River from those considered in 1981. (DRBC Exhibit 1).

75. There is substantial evidence in the record to support the Corp's conclusion that the withdrawal of water as permitted and regulated by the Delaware River Basin Commission will have no significant adverse impact on the Delaware River System. The project, with conditions imposed by the DRBC, will have no significant affect on salinity intrusion of well fields and surface

water users of the Delaware River. Withdrawal of water, even during low flow conditions, will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (Findings of Fact p.15, Corps Exhibit 2).

76. Flows in the East Branch Perkiomen Creek and North Branch Neshaminy Creek will be augmented by the project releases and minimum flows will be maintained under the project operating plan. The natural flow of the streams will not be diminished but will be augmented and enhanced, especially during low flow periods. (NWRA Exhibit 14, pp. V-2-26-V-23; DRBC Exhibit 3, pp.3-39-2-43; 2-51-2-53; and appendix E; NWRA Exhibit 13, pp. 46-59, 89; DRBC Exhibit 1, Staff Response, p. 14).

C. Groundwater Is Not A Viable Or Feasible Alternative To Surface Water Supply.

77. In studies undertaken prior to

February, 1979, it was found that ground-water was inadequate to meet all of the future public water supply needs of Central Bucks and Montgomery Counties. The "no-action alternative" would deprive the residents of these counties of a safe, adequate water supply system and adverse economic and environmental conditions could be anticipated. The most prominent adverse conditions would be the lack of water for domestic, commercial and industrial needs, the drying up of surface water streams of the areas, and the contamination of the groundwater aquifer by over pumping of wells in an attempt to meet the water demands. (Environmental Report on the Neshaminy Water Supply System, Neshaminy Water Resources Authority, February 1979, p. VII-7, NWRA Exhibit 14).

78. In August 1980, the Delaware River Basin Commission concluded that

further development of groundwater was considered the "least desirable water supply alternative" for Central Bucks and Montgomery Countys. (Final Environmental Assessment for the Neshaminy Water Supply System, Delaware River Basin Commission, August 1980, pp. 2-28, DRBC Exhibit 3).

79. In 1980 and early 1981, the Eastern Pennsylvania Region endured a period of moderate to serious rainfall shortages. By March 1981, over 4,000 domestic wells in this region had gone dry as a result of this drought. Four thousand families found themselves without water for essential drinking, sanitation and other domestic uses; costs of replacing these supplies represented an economic loss of over \$6.7 million. (DER Environmental Assessment Report and Findings, Point Pleasant Water Supply Project, August 1982, p. 69, NWRA Exhibit 13).

80. In a special groundwater study of the Middle Delaware River Basin prepared by R. E. Wright Associates, Inc. for the Delaware River Basin Commission, Wright Associates concluded that groundwater withdrawals exceed dry year recharge in large areas of Bucks and Montgomery Counties. (Special Groundwater Study of the Middle Delaware River Basin, R. E. Wright Associates, Inc., July 1982, Vol. III, Chapter XIII, Plaintiffs' Exhibit 14).

81. Based on the information contained in the R. E. Wright Associates Groundwater Study prepared for the Delaware River Basin Commission, the Department of Environmental Resources determined in August, 1982, that further development of groundwater, as an alternative to a supplemental surface water supply, was an unacceptable option for the Central Bucks and Montgomery County

Region. (Environmental Assessment, Report and Findings, Point Pleasant Water Supply Project, Department of Environmental Resources, August 1982, p. 71, NWRA Exhibit 13).

82. In September 1982, the Delaware River Basin re-evaluated the groundwater alternative to the Neshaminy Water Resources Authority Water Supply Project. The DRBC concluded, inter alia, that further development of the groundwater is an unacceptable option for the Central Bucks and Montgomery Counties. (Staff Response to Petitioners' Factual Allegations of September 24, 1982, Allegation 4-H, pp. 17-19, DRBC Exhibit 1).

III. THE U.S. ARMY CORPS OF ENGINEERS FULLY COMPLIED WITH THE MANDATES OF SECTIONS 106 and 110(F) OF THE NATIONAL HISTORIC PRESERVATION ACT.

83. A 1978 report, commissioned by NWRA and written by two University of Pennsylvania Archeologists, Urban and

Schortman, concluded that the Point Pleasant Pumping Station would not adversely effect potential archeological resources or historical resources, including the Delaware Division of the Pennsylvania Canal ("Canal") and the Village of Point Pleasant, if mitigation procedures as outlined in the report are followed. (Plaintiffs' Exhibit 44, pp. 35-37).

84. NWRA, based upon the Urban and Schortman Report, set forth in its 1979 Environmental Report procedures to be followed for placing of the intake conduit under the Canal, including the on-site presence of an archeologist. NWRA also proposed to design the Pump Station Building in a manner to conform with its surroundings. (NWRA Exhibit 14, Appendix C).

85. DRBC evaluated the Urban and Schortman Report and NWRA's Environmental

Report and concluded that the Point Pleasant Pumping Station would result in no adverse impact upon nearby cultural resources, including the Canal. (DRBC Exhibit 3, pp. 2-34).

86. The designated State Historic Preservation Officer ("SHPO") in Pennsylvania is the Pennsylvania Historical and Museum Commission.

87. After reviewing DRBC's Final Environmental Assessment, the SHPO advised DRBC that the SHPO agreed that the Point Pleasant Pumping Station would have no adverse impact upon archeological resources in the area. The SHPO further said that the Point Pleasant Station would have a technical adverse impact upon the Canal which could be adequately mitigated by archeological monitoring of the project excavation as proposed. (NWRA Exhibit 16).

88. DRBC's approval under Section

3.8 of its Compact was conditioned upon adoption of the measures in Appendix C of NWRA's Environmental Report. (NWRA Exhibit 3).

89. DRBC was advised that consultation with the Advisory Counsel on Historic Preservation ("ACHP") under the National Historic Preservation Act of 1966 would be required in conjunction with review of the Point Pleasant Pumping Station. (NWRA Exhibit 16, Plaintiffs' Exhibit 45).

90. DRBC deferred to the Army Corps of Engineers in conjunction with the latter agency's review of NWRA's permit application for the construction of the intake structure, to act as lead agency for the purpose of consultation with ACHP. (Plaintiffs' Exhibit 45).

91. Upon the recommendation of the SHPO, the Corps commissioned Ms. Elizabeth Mintz to prepare a report on the

proposed Point Pleasant Historic District to be submitted to the Keeper of the National Register in support of request by the Corps for a determination of eligibility of the Point Pleasant Historic District for inclusion in the National Register. (NWRA Exhibit 29-1).

92. On December 15, 1981 the Corps submitted to the keeper of the National Register said report along with its request for determination of eligibility and comments on the report prepared by the Bucks County Conservancy, NWRA and the Pennsylvania Historical and Museum Commission ("PHMC"). (Plaintiffs' Exhibit 48).

93. On December 29, 1981, the Point Pleasant Historic District was determined eligible for the National Register of Historic Places by the Keeper of the Register. Upon receipt of the Determination of Eligibility, the Corps began its

consultation with ACHP in fulfillment of the responsibilities imposed by the National Historic Preservation Act of 1966 and its implementing regulations. (Plaintiffs' Exhibit 49).

94. In the meantime, there was an on-going consultation among the SHPO, NWRA, the Corps and the Heritage Conservation and Recreation Service ("HCRS") to develop plans for the aboveground elements of the Point Pleasant Pumping Station which would either avoid or mitigate any potential adverse effects upon the Village of Point Pleasant.

95. On May 27, 1981, representatives of NWRA, the Corps, SHPO, and the HCRS attended a meeting at the site of the Proposed Point Pleasant Pumping Station at which NWRA's plans for the design of the Pump Station Building and its attendant landscaping were reviewed and approved. (NWRA Exhibit 18).

96. On September 28, 1981, the SHPO formally approved NWRA's plans for the design of the Pump Station Building and its attendant landscaping and advised the Corps that, in the opinion of the SHPO, the proposed structure would not have an adverse impact upon the village of Point Pleasant should it be determined eligible as an historic district. (NWRA Exhibit 19, Appendix F).

97. NWRA's plans for the design of the Pump Station Building and its attendant landscaping were also submitted to the ACHP. (Letter dated January 19, 1982 from E. H. Bourquard to Charlene [sic] Dwin, attached to letter dated March 18, 1982 from Ann A. Nevel to Richard Hassel, Army Corps of Engineers. (Certified Record, Part B).

98. The Corps commissioned Ms. Elizabeth Mintz to prepare a Preliminary Case Report which, when completed, was

circulated, inter alia, to the SHPO, the ACHP and the Bucks County Conservancy. (NWRA Exhibit 19).

99. The Preliminary Case Report included the opinions of the Bucks County Conservancy and of Del-AWARE Unlimited, Inc. as representative of the views of others who had expressed concern about the potential affect of the proposed water intake facilities on historical and archeological resources in the vicinity and stated that those opinions had been noted by the Corps. (NWRA Exhibit 19, p. 15).

100. The Preliminary Case Report was submitted to the ACHP with a determination by the Corps that the Point Pleasant Pumping Station would have no adverse impact upon the Point Pleasant Historic District but would have a technical adverse effect upon the Canal which would be adequately mitigated if N.W.R.A.'s

proposed construction procedures were implemented. (NWRA Exhibit 20).

101. The SHPO praised the Preliminary Case Report, however, reversed its earlier approvals and called for Pre-Construction Archeological Testing and Evaluation at the site. (NWRA Exhibit 21).

102. The ACHP, in conjunction with the Corps and the SHPO, with input from the Bucks County Conservancy and the HCRS, developed a Memorandum of Agreement designed to mitigate or avoid any potential adverse affects that may be caused by the Point Pleasant Pumping Station. The development process included a meeting attended by representatives of Del-AWARE Unlimited, Inc., the Bucks County Conservancy, the Corps, the ACHP, the SHPO and the HCRS.

103. The Memorandum of Agreement was signed by representatives of the Corps,

the SHPO, and the ACHP. The Memorandum of Agreement is an attachment to and a condition of, NWRA's Permit from the Corps. (Corps of Engineers Exhibit 5).

104. In its Preliminary Case Report, the Corps noted that "every effort has been made to minimize harm to the Canal which may result from the present proposal for the location, design and construction of the water intake facilities. In light of the alternatives discussed and mitigation procedures outlined, the present proposal represents the most feasible and prudent course of action." (NWRA Exhibit 19, p. 14).

105. There has been and will be no Federal Funding for the Point Pleasant Station. (NWRA Exhibit 19, p. 17).

106. The Canal is neither federally owned nor federally controlled. (NWRA Exhibit 22).

107. Alternatives to the Neshaminy

Water Supply System as a whole as well as to the Point Pleasant Pumping Station were evaluated and rejected as infeasible by NWRA in the 1979 Environmental Report and by DRBC in its Final Environmental Assessment of 1980. (NWRA Exhibit 19, Appendix D).

108. On June 14, 1982, in response to a report written by Del-AWARE Unlimited, Inc. outlining proposed alternatives to the Point Pleasant Water Diversion Project, NWRA advised the Corps that NWRA and the expert regulatory agencies in their respective reviews and evaluation of the Neshaminy Water Supply System, have long been aware of, have fully studied and evaluated, and have rejected as infeasible, all the alternatives specifically suggested by Del-AWARE Unlimited, Inc. (NWRA Exhibit 23).

109. On August 13, 1982, the Secretary of the Pennsylvania Department of

Environmental Resources ("DER") advised the ACHP that DER, in the process of preparing its Environmental Assessment in conjunction with the issuance of a Dams and Encroachment Permit to NWRA for the Point Pleasant Pumping Station, considered every alternative raised by Del-AWARE Unlimited, Inc. and other opponents of the project and that "none of the alternatives, was found to be more cost-effective or involved substantially less environmental impacts" than the proposed project. (NWRA Exhibit 13, pp 67-80; NWRA Exhibit 22).

110. The Corps was provided with the results of the Department of Environmental Resources 1982 evaluation of alternatives. (NWRA Exhibit 22; NWRA Exhibit 13).

111. The Corps' Preliminary Case Report concludes that the specific site selected for the Point Pleasant Pumping

Station is virtually the only feasible one. (NWRA Exhibit 19, p. 12).

112. On September 9, 1982, the Corps advised the ACHP of the Corps confidence that there is no alternative but to cross the Canal for which planning steps had been taken to minimize any potential harm. (NWRA Exhibit 24).

113. The Department of Environmental Resources, the owner of the Canal, after its review and analysis of the construction procedures to be utilized in conjunction with the Canal crossing, granted approval of said procedures and concluded "that construction of the Point Pleasant project, followed by restoration in accordance with the specifications approved by this agency, will leave the Delaware Canal in the vicinity of Point Pleasant in better shape than it is today." (NWRA Exhibit 13, pp. 43-46; NWRA Exhibit 22).

114. The Memorandum of Agreement requires NWRA to undertake an extensive archeological testing program prior to commencement of construction. (Corps of Engineers, Exhibit 5).

115. The Memorandum of Agreement requires NWRA to utilize specific construction and restoration procedures incident to the pipeline crossing under the Delaware Canal. (Corps of Engineers, Exhibit 5).

116. The Memorandum of Agreement requires NWRA to design the above ground facilities in consultation with the SHPO, landscape the area in a manner to minimize the visual impacts of the pumping station and boundary fence in the surrounding area. (Corps of Engineers Exhibit 5).

**IV. THE U.S. ARMY CORPS OF ENGINEERS
CONSULTED WITH THE FISH AND WILDLIFE
SERVICE IN ACCORDANCE WITH THE
SUBSTANTIVE PROVISIONS OF THE FISH
AND WILDLIFE COORDINATION ACT.**

117. In December, 1980, the U.S.

Fish and Wildlife Service submitted substantive comments to the Delaware River Basin Commission for review in conjunction with the Delaware River Basin Commission's processing of NWRA's application for Section 3.8 approval. (Letter dated December 16, 1980 from Norman R. Chupp, Area Manager, U.S. Department of Interior, Fish and Wildlife Service to the Delaware River Basin Commission, Corps of Engineers Exhibit 1).

118. From December 1980, to February 1981, the technical staff of the Delaware River Basin Commission reviewed and assessed the substantive concerns expressed by the Fish and Wildlife Service in their correspondence of December, 1980. (Staff Response to Chupp, December 16, 1980, statement in regard to the Neshaminy Water Resources Authority Project, Corps of Engineers Exhibit 1).

119. In February 1981, the Executive

Director of the Delaware River Basin Commission notified the Honorable Sherman Tribbet, the Federal Representative on the DRBC, of the Delaware River Basin Commission's staff evaluation of the concerns expressed by the Fish and Wildlife Service. Contained therein was a detailed response to each and every issue raised by the Fish and Wildlife Service. (Letter dated February 4, 1981, from Gerald M. Hansler, Executive Director of the Delaware River Basin Commission to the Honorable Sherman W. Tribbet, Department of the Interior, with attachments, Corp of Engineers Exhibit 1).

120. The February 18, 1981 Docket Decision of the Delaware River Basin Commission clearly evidences DRBC's sensitivity to the issues that had been raised by the Fish and Wildlife Services. (NWRA Exhibit 3).

121. Condition "L" of the DRBC Docket Decision requires NWRA to cooperate with the Fish and Wildlife Service in the choice of an intake structure design. (NWRA Docket Decision No. D-65-76CP(8), February 18, 1981, NWRA Exhibit 3).

122. Condition "N" of the DRBC Docket Decision requires NWRA to construct the intake structure in the river during the period between November through March "to reduce the potential for impact on migrating juveniles and adult shad." (NWRA Docket Decision D-65-76CP(8) February 18, 1981, NWRA Exhibit 3).

123. Condition "U" of the DRBC Docket Decision requires construction of the Delaware River intake and intake conduit to be controlled to minimize any and all impacts on existing wetland areas. (NWRA Docket Decision #D-65-

76CP(8), February 18, 1981, NWRA Exhibit 3).

124. The Delaware River Basin Commission consultation, review and conclusions with respect to the substantive concerns raised by the Fish and Wildlife Service were judicially approved by the United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals. (Del-AWARE Water Emergency Group, et al. v. Gerald M. Hansler, et al., 536 F.Supp. 26 (E.D. Pa. 1981) aff'd., 681 F.2d 805 (3d Cir. 1982).

125. In June 1981, the U.S. Fish and Wildlife Service submitted to the U.S. Army Corps of Engineers substantive comments for consideration in the Corp processing of NWRA's permit application to build a water intake structure in the Delaware River at Point Pleasant. (Letter dated June 19, 1981, from the

U.S. Department of the Interior, Fish and Wildlife Service, to Colonel Ton, U.S. Army Corp of Engineers, Plaintiffs' Exhibit 65).

126. In July 1981, the Army Corps of Engineers requested the applicant, NWRA, to respond to the substantive comments raised by the U.S. Department of Interior, Fish and Wildlife Service. (Letter dated July 2, 1981, from Roy Denmark, Jr., Chief of the Corps, Permits Branch, to E. H. Bourquard, Engineer for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

127. By letter dated January 22, 1982, the applicant, NWRA, provided detailed substantive responses to the concerns expressed by the Fish and Wildlife Service in June 1981. The issues raised related to secondary impacts which have been fully evaluated by the DRBC when DRBC authorized NWRA to

withdraw up to a maximum of 95 mgd from the Delaware River from Point Pleasant. Furthermore, the Fish and Wildlife Service's concerns regarding dissolved oxygen, diadromous fish, salinity intrusion in the Delaware Bay, effects of more "skimming reservoirs", and the effects of the diversion on the North Branch of the Neshaminy Creek and East Branch of the Perkiomen Creek were merely reiterations of the same concerns that had been raised by the Fish and Wildlife Service with the DRBC, all of which had been considered and addressed by the DRBC in Docket Decision No. D-65-76CP(8). (Letter dated January 22, 1982, to Lt. Col. Roger L. Baldwin, Army Corps of Engineers from Hershel J. Richman, attorney for Neshaminy Water Resources Authority, Corps of Engineers Exhibit 1).

128. In February 1982, the substantive comments and responses from Hershel

J. Richman, attorney for Neshaminy Water Resources Authority, and E. H. Bourquard Associates, engineer for Neshaminy Water Resources Authority, were forwarded to the Fish and Wildlife Service by the Corps of Engineers for further evaluation and consultation. (Letter dated February 18, 1982 to Norman R. Chupp, U.S. Department of the Interior, Fish and Wildlife Service, from Roy E. Denmark, Jr., Chief, Permits Branch of the Corps of Engineers, Corps of Engineers Exhibit 1).

129. In March 1982, the Pennsylvania Fish Commission notified the United States Army Corps of Engineers indicating their opposition to the Point Pleasant Water Diversion Project. The Pennsylvania Fish Commission did not, however, state their reasons for such opposition nor did they indicate to the Corp what areas, if any, should be further evaluated in the permit application process.

(Letter dated March 24, 1982, from Jack G. Miller, Chief, Fisheries Environmental Services, Pennsylvania Fish Commission, to Col. Roger L. Baldwin, District Engineer, Corp of Engineers, Corps of Engineers Exhibit 1).

130. In June, 1982, the Corps of Engineers responded to all of the substantive comments previously raised by Fish and Wildlife Service during the consultation process; specifically, "cumulative effects", "dissolved oxygen", and "salinity intrusion." (Letter dated June 1, 1982, from Col. Roger L. Baldwin, Corp of Engineers, to Norman R. Chupp, Area Manager, U.S. Department of Interior, Fish and Wildlife Service, Corps of Engineers Exhibit 1).

131. In July, 1982, a new Memorandum of Agreement was entered into between the Department of Interior and the Department of the Army. Said Agreement adopted

general policies and consultation procedures to be implemented by the two agencies in the Corp's processing of permit applications under §10 of the Rivers and Harbors Act, and §404 of the Clean Water Act. Additionally, the Memorandum of Agreement contained extensive procedures for review by a higher authority ("Elevation") in the event the Corps desired to issue a permit over outstanding objections by the Fish and Wildlife Service. (Memorandum of Agreement between the Department of Interior and the Department of the Army dated July 6, 1982, Corps Exhibit 4).

132. From July, 1982 to October, 1982, the Department of Interior, Fish and Wildlife Service and the U.S. Army Corps of Engineers continued consultation as required by the Fish and Wildlife Coordination Act; evidenced by approximately 15 pieces of correspondences

between the two agencies. (Corps of Engineers Exhibit 1).

133. In September, 1982, in conformity with the Memorandum of Agreement entered into between the Department of the Army and the Department of the Interior, the Corps notified the Fish and Wildlife Service of their intent to issue a permit to NWRA. (Letter dated September 24, 1982 from Col. Roger L. Baldwin, Corp of Engineers, to Howard N. Larson, Regional Director, U.S. Fish and Wildlife Service, Corps of Engineers Exhibit 1).

134. In October, 1982, the Fish and Wildlife Service responded to the Corps notice of intent to issue a permit to NWRA. Although expressing general opposition to the Point Pleasant project, the Fish and Wildlife Service notified the Corps that "Elevation" would not be sought. (Letter dated October 18, 1982, from Howard N. Larson, Regional Director

of Fish and Wildlife Service to Col. Roger L. Baldwin, U.S. Army Corp of Engineers, Corps of Engineers Exhibit 1).

V. THE BIOLOGICAL OPINION OF THE NATIONAL MARINE FISHERIES SERVICE, DETERMINING NO SIGNIFICANT ADVERSE IMPACT ON THE ENDANGERED SHORNOSED STURGEON, EVIDENCES FULL COMPLIANCE WITH THE ENDANGERED SPECIES ACT BY THE U.S. ARMY CORPS OF ENGINEERS.

135. Pursuant to the request of NMFS and the Corps, a biological assessment of the impacts of the Point Pleasant Pumping Station and associated intake structure on the endangered species of shortnosed sturgeon, Acipenser Brevirostrum, was undertaken in 1981 by Harold M. Brundage of Ichthyological Associates, Inc. (NWRA Exhibit 36, p. 1).

136. Based on incidental capture records covering periods 1817 through 1981, the January 1982 biological assessment report states: "There is essentially no empirical information regarding

utilization of the Delaware River near Point Pleasant by shortnosed sturgeon." (NWRA Exhibit 36, pp. 70 and 51-67).

137. During Ichthyological Associates, Inc.'s intensive gill net sampling program, conducted from October through December 1981, no shortnose sturgeon were collected at the three sampling zones (1) upstream at Prahls Island, (2) Point Pleasant site or (3) downstream at Lumberville Wing Dam. (NWRA Exhibit 36, pp. 57-59).

138. All life cycles of the short-nose sturgeon including egg, larvae, juvenile, and adult stages, were portrayed in extensive detail in the January 1982 biological assessment and it concluded that "the Delaware River does not represent habitat unique or essential to shortnose sturgeon" and that "no critical habitat for the shortnose sturgeon has

been designated." (NWRA Exhibit 36, pp. 72 and 35-50).

139. Construction of the intake structure will occur only from November through March; it is uncommon for short-nosed sturgeon to be in the upriver areas after August and is absent during mid-December through May. (NWRA Exhibit 36, p. 72).

140. No shortnose sturgeon should be present near the site during the construction period; however, assuming this species did occur at the site, a special submarine blasting procedure (designed to reduce concussion and minimize blasting vibrations) has been developed to minimize potential impact to aquatic life. Such procedure is based on considerable literature regarding physical properties of an underwater blast as related to the effect on fish. (NWRA Exhibit 36, p. 74).

141. Although there was no indication that the Point Pleasant area of the Delaware River is utilized by shortnose sturgeon, the January 1982 biological assessment assuming the "worst case" situation evaluated all potential impacts that the construction and operation of the Point Pleasant Pumping Station and intake structure could have on all life cycle stages of this species. (NWRA Exhibit 36, pp. 1 and 70-94).

142. The conclusions stated in the January 1982 biological assessment prepared by Ichthyological Associates, Inc. were: (1) no critical habitat for the shortnose sturgeon had been designated at Point Pleasant; (2) no shortnose sturgeon have been taken from such location either historically or during intensive net sampling program; (3) based on known seasonal movements and results of sampling, it is unlikely that

shortnose sturgeon will occur in the vicinity of Point Pleasant during the construction period November through March; (4) in the unlikely event that shortnose sturgeon did occur in the construction area, they would not be adversely affected by the construction because the increased turbidity is well within the species' tolerance range; (5) the Point Pleasant intake structure represents the state-of-the-art technology for mitigating entrainment/impingement of aquatic organisms and shortnose sturgeon during egg, larvae, juvenile, and adult life cycles; and (6) the project will have a biologically insignificant effect on downstream dissolved oxygen concentrations. (NWRA Exhibit 36, pp. 1-3).

143. Pursuant to Section 7(b) of the Endangered Species Act, NMFS reviewed the January 1982 biological assessment and

all other available data concerning the potential impacts on the shortnose sturgeon and NMFS sent the Corps a Biological Opinion on July 19, 1982. (Corps of Engineers Exhibit 12).

144. NMFS' Biological Opinion dated July 19, 1982, concluded that "construction and operation of the Point Pleasant Pumping Station is not likely to jeopardize the continued existence of the endangered shortnose sturgeon in the Delaware River." (Corps of Engineers Exhibit 12, Biological Opinion, p. 16).

145. In its July 19, 1982 transmittal letter, NMFS advised the Corps that the Point Pleasant "project construction during the period November-March should cause no significant adverse effects on shortnose sturgeon present in the area.. .[and] the proposed state-of-the-art design of the water intake structure and projected schedule of withdrawals are

adequate to ensure that juvenile and adult shortnose sturgeon as well as sturgeon eggs and larvae present in the project area will not be significantly affected." (Corps of Engineers Exhibit 12, p. 1).

146. NMFS advised Robert Sugarman (counsel to plaintiffs, Del-AWARE Unlimited, Inc.) by letter dated September 30, 1982, that the possibility of reduced by-pass velocities did not change the NMFS Biological Opinion which stated that "the operation of the Point Pleasant Pumping Station would not be likely to jeopardize the continued existence of shortnose sturgeon in the Delaware River." (NWRA Exhibit 12, p. 1).

147. NMFS' "gave due consideration to the hydraulics of the proposed intake structure in the [biological] opinion, however, maintenance of river flow above 3,000 cfs throughout the year, was not a

basis for our conclusion...Sturgeon movements patters from other river systems show that these life stages [larvae and juvenile] are not likely to stay in the upper reaches of the river for very long....Delaware River water flows peak in March and April, therefore, adequate water velocity should be maintained past the intake structures in the early Spring when shortnose sturgeon are likely to be in the vicinity." (NWRA Exhibit 12, p. 1).

VI. All of the Administrative Agencies Carried Out Their Review and Decision Making Responsibilities in Good Faith.

148. At the outset of their involvement in this matter, the Corps advised NWRA that it wanted to examine the entirety of NWRA's planned activities in connection with the Point Pleasant Water Diversion Project to ascertain what was involved, the extent of the Corps'

jurisdiction and the permits which would eventually be required by NWRA and PECO to complete the project. To this end, the Corps required submission of extensive detailed data from NWRA. (Plaintiffs' Exhibit 15).

149. By letter dated September 8, 1980 NWRA and PECO provided the information requested. (Corps of Engineers Exhibit 9).

150. Thereafter, the Corps processed NWRA's application for permits for the Point Pleasant intake and pumping station and for the Pine Run rechannelization together, including holding public hearings on the two permit applications together. The processing of the application on the Point Pleasant intake and pumping station was completed before completion of the application on Pine Run and it was issued. (Corps of Engineers Exhibit 5).

151. Given the limitations of construction applicable to the intake, the length of time projected for completion of the intake and pumping station, the projected date by which PECO may need water from the Delaware, and the fact that the approval of the Pine Run rechannelization is not essential for the completion and use of the Point Pleasant diversion, it was reasonable for the Corps to issue the permit for Point Pleasant before completion of review of Pine Run.

152. The Corps' attempt to persuade the Fish and Wildlife Service not to "elevate" its objections to the project was not, nor is it evidence of, an abuse of discretion.

153. The Corps' determination, on or about June 8, 1981, that the Bucks County Conservancy was not a viable prospective contractor to perform historical and

archeological reviews of the area including the Village of Point Pleasant, was proper in light of the letter of March 29, 1981 from the Conservancy to the Corps apologizing for previously sending the Corps certain incomplete and incorrect information and explaining that they did not have the resources or staff to perform detailed reviews, even on a contract basis. (NWRA Exhibit 17).

154. NWRA's suggestion that the action be taken under National Historical Preservation Act prior to the determination of whether the Village of Point Pleasant was eligible for inclusion on the National Register of Historical Places was not improper, because they offered to be bound by the requirements of the Act upon the assumption that Point Pleasant was eligible. Moreover, the Corps refused to permit such action until the determination was formally made,

which only caused further delay in the processing of the permit.

155. Colonel Baldwin's refusal to meet, or to send a representative to meet, with representatives of Del-AWARE on-site in December 1981 or to attend a conference sponsored by Del-AWARE and apparently focused on opposing the project, was not an abuse of discretion, nor was it unreasonable.

156. There is no evidence of record from which it could reasonably be inferred that the Corps, or any other reviewing agency, acted other than in the good faith desire to carry out their responsibilities under the law.